than 120 days to approve or disapprove a system transfer is, by virtue of Section 636(c), superseded and preempted by Section 617(e).[60] Public policy concerns, particularly in the context of a comprehensive federal statute such as the 1992 Cable Act, militate against permitting a franchising authority to take actions that could circumvent this 120 day requirement.[61]

The purpose for this preemptive time period for review and action on a transfer request must be to invoke reasonable consistency, upon which operators (both buyers and sellers) and consumers may rely throughout the country, in the transfer process. The purpose may also be to preclude unreasonable delays and refusals to act and other dilatory tactics by franchising authorities. Consistency and reasonable expectations in the transfer process also are of particular significance to multiple system operators in the context of simultaneous multiple system

[60]Any requirement (e.g., an express term in a franchise agreement or pursuant to any applicable state law or local ordinance) for a franchising authority to act in less than 120 days is not preempted or superseded by Section 617(e). Section 636(a) of the Communications Act of 1934 provides: "Nothing in this title shall be construed to affect any state, political subdivision, or agency thereof, or franchising authority regarding matters . . . to the extent consistent with the express provisions of this title."

[61]See City of Dubuque v. Group W Cable, No. C 85-1046 (ND. Iowa, June 18, 1986) (1986 WESTLAW 15646) ("The general rule appears to be that a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy. . . By the very language of the Act, it is clear that Congress intended to preempt local franchises and create a uniform national policy. To uphold waivers of that national policy would directly contravene the intent of Congress."). See also Brooklyn Bank v. O'Neil, 324 U.S. 697, 704 (1945).

transfers. The four months provided by Section 617(e) should be sufficient time for the entire transfer process, commencing with a substantially complete initial request and providing adequate time for clarifications, a hearing (if required), further deliberations and a decision.[62] The clear language of Section 617(e) also contemplates strict application of the 120 day clock. Neither the literal language of Section 617(e) nor any relevant legislative history suggests otherwise.

Establishment by the Commission of specific information requirements, the filing of which would cause the 120-day clock to begin to run, is necessary to preclude franchising authorities

[62] We draw the Commission's attention to the regulation of cable system transfers in the State of Massachusetts. In Massachusetts, a state statute governs transfer of cable licensing and control thereof, delegating authority for approval to local issuing authorities. See MASS. GEN. L., Ch. 166A ("MGL 166A"), § 7, et seq. The statute also establishes a state commission, which has developed regulations, procedures and forms implementing this statute, as well as a limited body of precedent interpreting the law. The state commission serves as the forum for appeals by operators from local authorities actions. See MASS. REGS. Code tit. 207 ("207 CMR") § 4.00, et seq.

In general, a local franchising authority in Massachusetts has sixty days within which to hold a public hearing resulting in action on a transfer application. Supplementation of an application with additional material may cause the hearing to be held more than sixty days after the initial filing, but such supplemental information does not trigger a new sixty day period. The extent of any such delay must be reasonable in light of the materiality of the supplemental information. See MGL 166A, § 14 and 207 CMR § 4.05. See also Teleprompter v. The Board of Selectmen of Auburn, Mass. CATV Docket No. A-37 (May 17, 1983); and Mass. CATV Bulletin 87-1, Commission Clarification of Certain Transfer Application Issues (November 25, 1987) (The Auburn decision is used to clarify this sixty day requirement.). Even allowing for the reasonable delays contemplated in the case of supplemental filings, Massachusetts policies still seem to contemplate completion of the transfer approval process within 120 days.

using transfer process for purposes that are not relevant in the transfer context and to eliminate the risk that an unreasonable refusal by a franchising authority to take any action will have unfair adverse consequences for the operator. Abuses of this nature by franchising authorities are not unusual in the transfer context. Time Warner has experienced numerous abuses by franchising authorities in the transfer process, particularly in connection with the merger of Time Inc. and Warner Communications Inc. Such abuses can result in unfair delays in completing transfers, and significant expenditures by system operators that are not actually required by the franchise agreement.

B. The Commission must establish the information deemed relevant to any necessary approval by a franchising authority of a transfer.

Section 617(e) expressly refers to "Commission regulations" identifying information "required" to evaluate a transfer request. This language obviously directs the Commission to establish such regulations which do not now exist; otherwise, such reference would be meaningless. The legislative history pertaining to Section 617(e) supports this conclusion.[63]

Time Warner believes it is explicit, and therefore is important for the Commission to acknowledge, that Section 617(e)

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[63]"The Committee intends that the FCC regulations <u>will be</u> designed to ensure that every franchising authority receives the information required to begin an evaluation of a request for approval of a sale or transfer." 1991 House Report at p. 120 and 1990 House Report at p. 118 (emphasis added). The emphasized language clearly reflects Congress' intent that the Commission <u>will</u> and, therefore, <u>shall</u> establish regulations.

applies to <u>any</u> transfer or assignment for which prior approval by a franchising authority is required, not just transfers subject to the three year holding requirement. Specifically, neither the reference in Section 617(e) to the three year holding requirement contained in the preceding subsections of Section 617, nor the fact that the 120 day limitation appears as a subsection in Section 617 along with the statutory provisions for the three year holding requirement, suggests or requires that the limitation in Section 617(e) applies only to transfers subject to (and not excepted from, by statutory exception or waiver) Section 617(a). Indeed, all of Section 617 - "Sales of Cable Systems" - applies to any transfer or assignment of any cable system or franchise. The Commission's regulations should make clear that the 120 day requirement in Section 617(e) is applicable to any transfer or assignment that requires prior approval from the franchising authority, regardless of the impact of the three year holding requirement addressed by subsections (a) through (d) of Section 617. By the same token, Section 617 was not intended to expand the scope of existing franchise agreements to require local approvals under circumstances beyond those specified in the contracts.

1. Commission regulations will be preemptive and controlling, except that franchising authorities may request additional information specifically identified by the franchise agreement as required in a transfer application.

Section 617(e) also contemplates, and related legislative history supports, that a franchising authority may request information in a transfer application in addition to that required by Commission regulations if "required. . . by the franchising authority". (Emphasis supplied.) Consistent with the clear meaning of "required" and the interest of Congress in a uniform and expeditious transfer process, Time Warner believes Section 617(e) intends that the franchising authority should not be allowed unilaterally to require additional information, except as required by the terms of the franchise agreement or applicable law. The combined expectation of Commission regulations determining what information is reasonable to ensure the beginning of a proper evaluation of a transfer request,[64] together with the notion of information required by the franchising authority, should limit a franchising authority's discretion to request additional information to material that is specifically identified in the franchise agreement or a related local ordinance or state legislation. General language permitting the franchising authority to "require" any additional information it may request should be preempted by the

[64] Id.

Commission's regulations pursuant to the express Congressional directive.

Interpreting Section 617(e) to limit unspecified information requirements is necessary to ensure that the 120 day clock can be consistently enforced. Applicants seeking approval of a transfer have an implicit right to know in advance and with sufficient detail what information will be required so that their initial application can be substantially complete, and so they can reasonably expect a decision by the franchising authority within 120 days. Moreover, once the 120 day clock begins to run, it can not be allowed to be interrupted.[65] The submission of additional information (i.e., clarifying information), even if properly requested or required by the franchising authority, subsequent to the substantially complete initial filing, should not and must not stop the clock, or start it over. To allow otherwise would eviscerate the purpose and impact of the 120 day clock, by allowing local authorities to interpret its tolling to suit their purposes.

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[65]Again, the legislative history quoted in the preceding footnote reflects that the Commission's regulations will identify information required to "begin" an evaluation. So, once such information and any other information specifically identified in the franchise agreement is on file, the franchising authority "shall" act within 120 days.

2. Only limited and reasonably specific information regarding the qualifications of the proposed transferee is relevant to a transfer.

The only consideration appropriate to a cable franchise transfer approval or denial is the qualifications of the proposed transferee.

> In the transfer process, the underlying concern is providing the [franchising] authority an opportunity to determine whether the transferee can assume the obligations of the transferor and continue the level of service provided by the transferor. In determining a potential transferee's ability to "step into the shoes" of the transferor, relevant factors include the transferee's financial capability, management and technical expertise, character and experience.[66]

Where the transfer of a franchise is contingent upon the prior consent of the franchising authority, the franchising authority may refuse consent only when it has a good faith reasonable objection to the qualifications of the proposed transferee even in the absence of a provision in the franchise agreement or applicable law prohibiting unreasonable or arbitrary withholding of such consent.[67]

Information with respect to the transferor and its compliance with applicable Commission policies or terms of the franchise agreement is not relevant. The transfer process must

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[66] Bay Shore Cable TV Associates v. Board of Selectmen of the Town of Weymouth, Mass. CATV Docket No. A-55 (November 15, 1985).

[67] See, e.g., Cohen v. Ratinoff, 195 Cal. Rptr. 84 (1983); Fernandez v. Vasquez, 397 So. 2d 1171 (Fla. 1981); and Homa-Goff Interiors, Inc. v. Cowden, 350 So. 2d 1035, 1038 (Ala. 1977).

not be used by a franchising authority as a pretext for enforcing provisions of the cable franchise by the transferor by making consideration of a transfer contingent upon the transferor fulfilling outstanding obligations under the franchise agreement. Transfer requests should only be contingent upon the transferee providing reasonable assurances regarding future franchise compliance.

Time Warner believes that the Commission should set forth specific information, which does not need to be extensive, in guidelines or in its own forms for applications for any necessary approval by a franchising authority of a transfer or assignment. The information should relate specifically and exclusively to the qualifications of the proposed transferee, which will allow a franchising authority sufficient information to decide whether to approve the transfer or assignment.

The guidelines or forms should include the following information requirements for transfers or assignments that require approval under the applicable local franchise:

(i) <u>Ownership information</u>.

(a) For individuals: the applicant's name, address, occupation and principal place of business.

(b) For partnerships: the applicant partnership's name, business, and principal place of business; along with the names, addresses, occupations and principal place of business of each general partner and any attributable limited partner holding more than a five percent (5%) ownership interest.

(c) For corporations: the applicant corporation's name, principal business and principal place of business; the state of incorporation; the names and addresses of each of the officers and directors; the name and address of its registered agent; the number of record shareholders; the names and business or residence address of shareholders known by the applicant to hold, control or have a beneficial interest in more than ten percent (10%) of the outstanding shares, identifying their interests. If the corporation is a foreign corporation, a certificate of authority to transact business in the state in which the system operates.

(ii) Experience.

A narrative account of the applicant's technical qualifications, experience and expertise, including but not limited to summary information about appropriate management personnel that will be involved in the system's management and operations. The applicant might also choose to list a representative sample of cable systems currently or formerly owned or operated.

(iii) Legal qualifications.

(a) Specific "yes/no" questions addressing the "legal" qualifications of the transferee analogous to those in the Commission's CARS transfer application.

(b) A copy of the transaction agreement between the transferor and transferee, including any exhibits or schedules necessary in order to understand the terms thereof; provided that, any pricing, operating, marketing or financial information that is otherwise not publicly available or required by the franchise agreement, may be redacted.

(c) A certification by the applicant that it will abide by and conform to all the provisions of the franchise agreement, and any related local ordinance and/or state legislation.

The Commission notes, as suggested by the legislative history for Section 617(e), that certain financial information also might be relevant in the franchise transfer process.[68] Franchising authorities often request detailed financial information which may include historical audited financial statements and pro forma financial statements or other financial projections for the system. Time Warner believes, particularly in the case of multiple system operators and multiple system transfers involving public company transferees, that generally available financial information about the transferee should be all that is required.[69] The financial qualification of the transferee can and should be determined by the franchising authority based upon publicly available financial information and reasonable certifications or testimony by an appropriate financial representative of the transferee.

It would be reasonable to require the transferee to establish its financial ability to consummate a purchase. As a general rule, though, an MSO's ability to complete the acquisition (whether the purchase price is to be paid in cash or any other type of consideration) should be reasonably discernible from the financial statements and other information publicly available. If such information suggests the transferee is (or is a part of) a financially viable entity, then its ability to close

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[68]See Notice at ¶ 23; and 1991 House Report at p. 120.

[69]For example, public reports filed with the Securities and Exchange Commission (the "SEC") by the ultimate parent entity and financial information filed by the operator or its appropriate affiliate with the Commission pursuant to Section 623(g) of the Communications Act of 1934.

should be presumed. This is a safe presumption, since no transfer will occur if the purchase consideration is not delivered. If its ability to close is uncertain, though, all that should be necessary is a reasonable assurance letter from the financing source or from the financial services firm (i.e., a commercial bank or investment banking firm) assisting in the financing arrangements. A summary description of the intended financing arrangements for the purchase might be reasonably required. The franchising authority, however, should not be allowed to require submission of complete documentation for specific financing arrangements (unless otherwise publicly available, such as if filed with the SEC).

Pro forma financial information or other projections present numerous problems and provide questionable assistance. Pro formas, moreover, can be difficult to prepare in a form understandable to the franchising authority or meaningful in the context of a group of systems or a multiple system operator. The subjective nature of many of the assumptions inherent in such projections present unnecessary opportunities for disagreement and delay. Questions about the purpose served by single system or group pro formas in the context of a substantial applicant such as Time Warner compound this problem. Finally, questions and disagreements can arise at the time of the transfer and later regarding whether the pro formas become somehow binding on the operator.

III. MMDS AND SMATV CROSS-OWNERSHIP PROHIBITIONS

A. Cross-ownership of cable and MMDS systems.

In the Notice, the Commission invites comment on its tentative conclusion that its recently adopted regulations implementing a cable/MMDS cross-ownership prohibition effectively implement the cross-ownership prohibitions of the 1992 Cable Act with regard to the MMDS service. The Commission bases this conclusion on the coincidence between the fundamental purpose of the cable/MMDS cross-ownership prohibition rulemaking and the purpose underlying Congress' enactment of a similar prohibition.[70] As the Commission notes, the purpose of both prohibitions is to promote competition in multichannel video distribution.[71] While Time Warner strongly disagrees with the notion that cable/MMDS cross-ownership restrictions are necessary or appropriate, we concur that the Commission's present cable/MMDS cross-ownership regulations appear to carry out the Congressional mandate in Section 613(a)(2) of the 1992 Cable Act. Time Warner also urges the Commission to adopt a liberal waiver policy in accordance with Section 613(a)(2)(B) of the 1992 Cable Act.

For example, in creating the rural exception to the cable/MMDS cross-ownership rules, the Commission recognized the utility of allowing cable operators to hold MMDS licenses in

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[70] <u>See</u> Notice at ¶¶ 25-26.

[71] <u>See</u> Notice at ¶ 25; and 47 U.S.C. § 533.

order to provide service in rural areas that would otherwise remain unserved by MMDS.[72] Time Warner urges the Commission to retain this exception to foster the provision of cable service to rural areas where such service might not be economically attractive or even viable for a MMDS operator, but would be as an extension of an existing nearby cable system. Such an exception will further the Commission's goal of avoiding the delay of service to rural customers and, as the Commission has noted, will not appreciably reduce "realistic and desired opportunities" for MMDS operators "to introduce service competitive with existing cable service."[73]

Second, the Commission should retain the local programming exception to the licensing and leasing prohibitions of the cross-ownership rules as a means of preserving an additional outlet for locally originated programming. Indeed, in instituting the exception, the Commission stated that it did so "[i]n recognition of the public interest benefit which can derive from local programming ventures."[74] As the Commission has further recognized, the exception allows for the wider distribution of programming produced "in or near the cable operator's franchise area and not broadcast on a television station available within

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[72]See Wireless Cable Service ("Wireless II"), 6 FCC Rcd 6792, ¶¶ 34-37 (1991).

[73]Wireless II, 6 FCC Rcd at ¶ 37. See also Wireless Cable Service ("Wireless I"), 5 FCC Rcd 6410, ¶¶ 41-42 (1990).

[74]Wireless II, 6 FCC Rcd at ¶ 41.

that franchise area."[75] In adopting these cable/MMDS regulations and exceptions as an implementation of the 1992 Cable Act cross-ownership prohibition, Time Warner urges the Commission, however, to specifically reiterate that locally originated programming may include: (1) relevant programming produced elsewhere, so long as it is incorporated in a larger local program; and (2) programming which has aired on local television stations.[76] Any more rigid definition of locally produced programming would be so narrow as to preclude any material derived from local broadcast news sources and included in other local news programming distributed over MMDS channels.

Finally, Time Warner urges the retention of a public interest waiver standard for cable/MMDS cross-ownership situations to allow, where appropriate, cable operators' use of MMDS channels in the provision of multichannel video programming. Congress has recognized the usefulness of these channels to cable operators in the dissemination of video programming and has explicitly authorized a waiver of the cross-ownership rules where the Commission determines it "necessary to ensure that all significant portions of a franchise area are able to obtain video programming."[77] Furthermore, an expedited waiver proceeding allows for a reasonable case-by-case analysis of a cable

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[75]Id.

[76]Id. at n.27.

[77]47 U.S.C. § 533(a)(2)(B).

operator's need for MMDS channels in order to distribute multichannel video programming and would acknowledge the significant public benefit a cable operator's use of such channels could achieve.

B. Cross-ownership of cable and SMATV systems.

The 1992 Cable Act makes it unlawful for a cable operator "to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system."[78] In promulgating regulations to implement this provision, the Commission should be particularly sensitive to the fact that cable operators today face extremely vigorous competition from SMATV operators, particularly in communities with any significant population that resides in multiple dwelling units ("MDUs"). Accordingly, Time Warner urges the Commission to adopt a blanket waiver of the SMATV/cable cross-ownership restriction in any community where 15% of MDU residents receive multichannel video programming service from a SMATV operator.[79]

It is significant to note that Congress did not ban all common ownership of cable television and SMATV facilities. For example, the statute requires the Commission to grandfather all SMATV services which were being provided by any cable operator as

[78] 47 U.S.C. § 533(a)(2).

[79] See 47 U.S.C. § 543(l)(1)(B)(ii).

of the law's enactment date.[80] Similarly, the Commission is given discretion to waive the statutory prohibition where "necessary to ensure that all significant portions of a franchise area are able to obtain video programming."[81]

The legislative history of the 1992 Cable Act makes clear that the cross-ownership prohibition was not intended to be applied blindly but with a careful eye toward balancing competing policy interests.

> [A] policy that only focuses on diversity and restricts the ownership of other outlets may ignore important economies of scale or scope, also raising prices and limiting offerings. Thus, the overall objective in reviewing media ownership is to strive for diversity while balancing genuine and significant efficiencies.[82]

Thus, the Commission must not interpret the statute in an overly broad manner to prohibit franchised cable operators from choosing for reasons of cost and efficiency to serve their customers through facilities that could technically be defined as SMATV facilities. This can be accomplished by prohibiting cross-ownership only in those instances where all of the statutory elements are met. Each of those elements is discussed in turn.

1. The cross-ownership prohibition only applies to "SMATV service" offered by a cable operator.

The narrow focus of the statute is evident from the fact that it does not prohibit the common ownership of cable and SMATV

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[80] See 47 U.S.C. § 533(a)(2)(A).

[81] 47 U.S.C. § 533(a)(2)(B).

[82] 1991 Senate Report at p. 46; 1990 Senate Report at p. 40.

facilities. Rather, the statutory language only prohibits cable operators from offering "satellite master antenna service."[83] Neither the 1992 Cable Act nor the Communications Act of 1934 provides a definition of SMATV service. However, Congressional intent as to the proper definition of SMATV service can be derived from Section 602(6) of the Communications Act of 1934 (as amended by the Cable Communications Policy Act of 1984 (the "1984 Cable Act")) as "a facility that serves only subscribers in one or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public rights-of-way."[84]

The Commission's decision in Earth Satellite Communications, Inc., establishing that SMATV is an unregulated service, is particularly instructive in this regard.[85] In that decision, the Commission acknowledged the similarity of cable and SMATV services in terms of technology, content and their equal ability

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[83]Congress clearly knew how to draft a facilities-based cross-ownership prohibition had it wished to prohibit all cross-ownership of cable television and SMATV systems. For example, Section 613(a) of the Communications Act of 1934 uses a facilities-based definition to prohibit the common ownership of colocated television broadcast stations and cable television systems. In contrast, as is the case with the cable/SMATV cross-ownership prohibition, Section 613(b)(1) of the Communications Act of 1934 utilizes a service based prohibition that allows telephone companies to own cable television facilities but prevents them from providing video programming services directly to subscribers in their telephone service area.

[84]47 U.S.C. § 522(6).

[85]Earth Satellite Communications, Inc., 95 FCC 2d 1223 (1983), aff'd sub nom., New York State Commission on Cable Television v. FCC, 749 F.2d 804 (D.C. Cir. 1984).

to serve multiple unit dwellings located entirely on private property.[86] However, the Commission rejected arguments that both types of service providers were entitled to the same regulatory treatment, noting that because cable systems were franchised to serve the whole community, there was a greater local interest in regulating cable systems.[87] In preempting all local and state regulation of SMATV systems, the Commission thus established that the identifying legal characteristic of SMATV systems is their unfranchised nature.[88]

While it is true that the failure to satisfy any of the elements of the SMATV exemption in Section 602(6) will convert a SMATV system into a cable system and subject unregulated SMATV service to the obligation to obtain a cable franchise,[89] it is equally true that franchised cable service does not lose its

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[86]This similarity was also noted by Congress when it enacted the 1984 Cable Act, 47 U.S.C. § 521, et seq. See S. Rep. No. 67, 98th Cong., 1st Sess. 19 (1983).

[87]Earth Satellite Communications, Inc., 95 FCC 2d 1223 at ¶ 22.

[88]SMATV services also are not subject to regulation by the Commission (except in the limited instance of the EEO certification). This is in contrast to comprehensive federal regulation of cable systems concerning such matters as rates, signal carriage, EEO, technical standards, signal leakage, customer service privacy, ownership, etc.

[89]See, e.g., City of Fargo v. Prime Time Entertainment, Inc., Civ. No. A3-87-47, 1988 U.S. Dist. LEXIS 16506 (D. N.D. 1988) (interconnection of non-commonly buildings located entirely on private property rendered facility subject to regulation as a cable system); and Massachusetts Community Antenna Commission, 64 RR 2d 173 (1987) (interconnection of single family homes located entirely on private property rendered facility a cable system subject to local regulation).

character or regulatory status merely because it is provided by a facility located entirely on private property. Indeed, one of the identifying characteristics of cable systems identified by the Commission in Earth Satellite Communications, Inc., was that while both cable and SMATV facilities were equally capable of serving multiple dwelling units located on private property, cable systems were not limited to providing such service. Accordingly, where a franchised cable operator provides service in conformity with the regulatory requirements of its franchise (and with the Commission's Rules), that service cannot be considered prohibited SMATV service merely because of the fact that the facility over which it is offered technically could be considered a SMATV system if it were offered on an unfranchised basis.[90]

Thus, a facility which fails to satisfy each of the elements of the SMATV exemption is not a SMATV facility, and thus the

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[90]Indeed, there is substantial confusion over just what facilities qualify as SMATV systems. See Beach Communications, Inc. v. FCC, 959 F.2d 975, appeal after remand, 965 F.2d 1103 (D.C. Cir.), cert. granted, FCC v. Beach Communications, Inc., 113 S. Ct. 594, 61 U.S.L.W. 3400 (1992). Even Congress appeared to have been somewhat confused. For example, the 1991 Senate Report, explaining the cross-ownership prohibition, states at p. 81:

> The Committee does not intend for this prohibition to apply to common ownership of an SMATV system that qualified as a "cable system" under Section 602(6) of the 1934 Act and a stand-alone SMATV system.

Given the fact that SMATV systems are defined in terms of an exclusion from the cable system definition, a facility can be either a cable system or a SMATV system but never both, a possibility suggested by the language cited above.

cross-ownership prohibition does not apply. To summarize those elements, for the cross-ownership ban to apply, the cable operator must provide:

1) A separate facility limited to serving subscribers only in one or more MDUs. If the facility also serves single family homes, for example, it is not SMATV service.

2) Each of the MDU buildings served must be under common ownership, control or management. If the facility is interconnected, by hardwire or otherwise, with one or more dwelling units not under common ownership or management, it is not SMATV service.

3) The facility must not cross public rights-of-way.

The applicability of these elements in the context of the SMATV/cable cross-ownership restriction will be explained in greater detail below.

2. Cable operators are only prohibited from offering SMATV service "separate and apart from any franchised cable service."

The statutory cross-ownership prohibition only applies to SMATV service that is offered separate and apart from any franchised cable service. Two significant results flow from this statutory language. First, if a cable operator constructs physical facilities within its franchised cable service area which would otherwise qualify as a SMATV system (for example, stand-alone facilities serving a single multiple unit building without crossing public rights-of-way), the cross-ownership prohibition would not apply so long as the cable operator subjects those operations to the requirements of local regulation under the operator's cable franchise.

A cable operator should not be prevented from providing service in a cost efficient manner to a single building or group of buildings within its franchise area on a stand-alone basis. For example, the construction of a stand-alone system serving an MDU complex may be required where intervening terrain or distance would preclude a plant extension to serve the complex on a cost effective basis. A blanket prohibition would be inconsistent with the legislative history of the statute which requires the Commission to balance such cost efficiencies against the goal of encouraging diversity and competition. Furthermore, to require an operator to construct a more costly microwave path or supertrunk facility in such situations merely to avoid a literal application of the cross-ownership prohibition would be in direct conflict with the Commission's statutory mandate to ensure reasonable rates for basic service.[91]

Once a cable operator chooses to provide service on a regulated basis in conformity with the requirements of its franchise (and with the Commission's Rules), the operator is not offering SMATV service "separate and apart from any franchised cable service," and thus the statutory prohibition is inapplicable. If the operator voluntarily subjects such facilities to local franchise obligations, such as the payment of

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[91] See 47 U.S.C. § 543(b)(1); and H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 63 (1992).

a franchise fee from revenues derived from such operations, PEG access requirements, etc., the operator is not offering SMATV service "separate and apart" from its franchised cable service.

Second, once a cable operator physically interconnects a cable system facility with an existing or newly constructed SMATV facility by a hardwire or non-hardwire means, the SMATV operation can no longer be considered separate and apart from the cable system and the cross-ownership prohibition does not apply.

This statutory element reinforces existing Commission decisions wherein interconnected systems which are comprised of a cable system portion and an SMATV portion have been held to be subject to regulation as cable systems in their entirety. For example, the Commission has held that a system that interconnected single family homes and multiple dwelling units via hardwire means was a cable system under Section 602(6)(B) of the Communications Act of 1934 despite the fact that the facilities were located entirely on private property.[92] This decision was based on longstanding Commission precedent that declines to extend unregulated SMATV status to facilities which serve single family homes.[93] Accordingly, once an SMATV system

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[92] Massachusetts Community Antenna Television Commission, 64 RR 2d at 173-174.

[93] See Bayhead Mobile Home Park, 47 FCC 2d 763 (1974); Pacific Western Mobile Estates, Inc., 49 FCC 2d 269 (1974); Citizens Development Corporation, 52 FCC 2d 1135 (1975); Sanwick Cablevision, Inc., 48 FCC 2d 563 (1974); Big Canoe Television Systems, 47 FCC 2d 449 (1974); and Leacom, Inc., 31 RR 2d 156 (1974).

is interconnected in any fashion with a facility that crosses public rights-of-way or which serves single family homes, the entire facility must be considered a single cable system and cross-ownership issues do not come into play.

Even where cable and SMATV facilities are interconnected via non-hardwire means, such as infrared or microwave, the fact that subscribers to the cable system portion of the interconnection are served via closed transmission paths renders the entire facility a cable system. Thus, clearly distinguished are situations like the one considered by the Commission in its recent decision clarifying the cable system definition contained in the Communications Act of 1934, wherein it held that the interconnection of two non-commonly owned multiple dwelling units via non-hardwire means was not a cable system because the definitional element of closed transmission paths were not present.[94]

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[94]Definition of a Cable Television System, 5 FCC Rcd 7638 (1990). On review, a federal appeals court rejected the Commission's determination that facilities which interconnected non-commonly owned buildings via hardwire were cable systems while facilities which interconnected non-commonly owned buildings via non-hardwire means were not cable systems as lacking a rational basis. Beach Communications, Inc. v. FCC, 959 F.2d 975, appeal after remand, 965 F.2d 1103 (D.C. Cir. 1992). The United States Supreme Court granted certiorari to review this case on November 30, 1992. FCC v. Beach Communications, Inc., 113 S. Ct. 594, 61 U.S.L.W. 3400 (1992). That review remains pending. Time Warner is confident that the Supreme Court will reject the plurality opinion of the D.C. Circuit in Beach and adopt the reasoning articulated in Fargo. See footnote 90, supra. Congress made no distinction in Sec. 602(6) between hardwire and non-hardwire interconnection -- a facility which interconnects non-commonly owned or managed MDU buildings, by whatever means, forfeits its unregulated SMATV status.

There may be situations where it is unclear whether cable and SMATV facilities that are interconnected by non-hardwire means are to be considered a single technically integrated system, or whether the SMATV facility can retain its characteristic as a SMATV system because the degree of interconnection is quite limited. For example, where a SMATV facility and one or more cable systems are part of the same regional advertising interconnect, one could argue persuasively that the SMATV facility does not become a cable system merely by joining an advertising cooperative in which cable systems are members. Thus, in order to clearly define those situations where interconnected facilities would be considered a single system and would thus not implicate the statutory cross-ownership prohibition, the Commission should consider a cable system and an interconnected SMATV facility to be one single system where the SMATV facility received at least 75% of its programming from the cable system via microwave or other non-hardwire means. This requirement is consistent with the Commission's recent determination that microwave hub sites fed from a single headend would be considered part of a single technically integrated cable system for purposes of technical standards compliance and proof of performance testing where that hub site received at least 75% of its signals from the headend facility.[95]

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[95]Memorandum Opinion and Order in MM Docket Nos. 91-169 and 85-38, FCC 92-508, ___ FCC Rcd ___, ¶ 17 (released November 24, 1992).

As a final matter, the Commission should acknowledge that the foregoing analysis applies regardless of whether the SMATV facility is initially constructed by the cable operator or whether it is subsequently acquired. As long as the cable operator has plans to integrate the SMATV system into its cable system within a reasonable amount of time (e.g., six months) and in fact does so, the acquisition of the SMATV facility by a cable system should not be prohibited by the 1992 Cable Act or require a Commission waiver.

3. Cable operators are free to provide SMATV service outside that "portion of the franchise area served by that cable operator's cable system."

Significantly, the statute does not prohibit cable operators from providing SMATV service within their entire franchise territories. Rather, the language of the statute limits application of the cross-ownership prohibition only to those instances where the SMATV system is located in that "portion of the franchise area served by [a] cable operator's cable system."[96] Thus, a cable operator which is franchised in one community is free to offer SMATV service in any other community where the cable operator does not hold a franchise. Moreover, even within a cable operator's franchise territory, the cable operator is free to offer SMATV service in those portions of the franchise area not actually served by the operator's cable system.

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[96] 47 U.S.C. § 533(a)(2).